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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 1

Docket ID FEMA-2017-0016

RIN 1660-AA91

Update to FEMA's Regulations on Rulemaking Procedures

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Emergency Management Agency (FEMA) proposes to revise its regulations pertaining to rulemaking. It proposes to remove sections that are outdated or do not affect the public, and it proposes to update provisions that affect the public's participation in the rulemaking process, such as the submission of public comments, hearings, ex parte communications, the public rulemaking docket, and petitions for rulemaking. FEMA also proposes to modify its waiver of the Administrative Procedure Act exemption for matters relating to public property, loans, grants, benefits, and contracts.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket ID FEMA-2017-0016, by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail/Hand Delivery/Courier: Regulatory Affairs Division, Office of Chief Counsel, Federal Emergency Management Agency, 8NE, 500 C Street, SW., Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Liza Davis, Associate Chief Counsel, Regulatory Affairs, Office of Chief Counsel, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, 202-646-4046, or (email) liza.davis@fema.dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Public Participation

We encourage you to participate in this rulemaking by submitting comments and related materials. We will consider all comments and material received during the comment period.

If you submit a comment, identify the agency name and the docket ID for this rulemaking, indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, or delivery to the address under the ADDRESSES section. Please submit your comments and material by only one means.

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal e-Rulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of www.regulations.gov.

Viewing comments and documents: For access to the docket to read background documents or comments received, go to the Federal e-Rulemaking Portal at <http://www.regulations.gov>. Background documents and submitted comments may also be inspected at FEMA, Office of Chief Counsel, 500 C Street, SW., Washington, DC 20472-3100.

II. Background

FEMA established its regulations regarding its rulemaking procedures in 1981, in 44 Code of Federal Regulations (CFR) part 1.¹ FEMA has not substantively updated part 1 since that time. Part 1 is based on a rescinded Executive Order, Executive Order 12291, entitled “Federal Regulation,” and obsolete agency procedure, which was relevant when FEMA was an independent agency,² but is no longer accurate, as FEMA is no longer an independent agency. FEMA now includes its internal rulemaking procedures addressing the development, drafting, and clearance of FEMA rules in internal guidance.

In this proposed rule, FEMA proposes a wholesale revision of part 1, removing sections that solely address internal agency procedure, and retaining and updating sections that directly affect the public’s participation in FEMA’s rulemaking process, namely, provisions addressing ex parte communications in rulemaking, petitions for rulemaking, the public rulemaking docket, hearings, and the process for submitting public comments on rules.

¹ See 46 FR 32583 (June 24, 1981) (final rule establishing 44 CFR part 1); see also 44 FR 50299 (Aug. 27, 1979) (proposed rule proposing to establish 44 CFR part 1).

² FEMA became a component agency of the Department of Homeland Security on March 1, 2003 pursuant to the Homeland Security Act of 2002, Public Law No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. 101 et seq.).

FEMA is also proposing to modify its waiver of the Administrative Procedure Act exemption for matters relating to public property, loans, grants, benefits, and contracts.

Section III of this preamble includes a section-by-section analysis of the current regulations and an explanation of the changes to each section.

III. Section-by-section analysis of the current regulations and proposed changes

Section 1.1 Purpose

Paragraph (a) of current section 1.1 states that 44 CFR part 1 covers FEMA's basic policies and procedures for adoption of rules, and that it incorporates provisions of section 4 of the Administrative Procedure Act. Section 4 of the Administrative Procedure Act (5 U.S.C. 553) addresses Federal agency requirements for notice and comment rulemaking. Notice and comment rulemaking is also known as "informal rulemaking." Paragraph (a) of current section 1.1 also includes a statement that 44 CFR part 1 and internal FEMA manuals implement Executive Order 12291.

FEMA proposes to limit the purpose of part 1 to describing FEMA's informal rulemaking procedures that affect the public. This proposed rule therefore does not describe FEMA's internal rulemaking procedures, which are more appropriately placed in internal guidance. FEMA proposes these changes for a number of reasons. First, the Administrative Procedure Act does not require internal agency procedure to be in regulation. See 5 U.S.C. 553(a)(2), 553(b)(A). Second, and more importantly, the references to Executive Order 12291 and implementing FEMA procedures are outdated. As noted above, Executive Order 12291 has been revoked, and was replaced with Executive Order 12866, "Regulatory Planning and Review."³ Executive Order 12866

³ 58 FR 51735 (Oct. 3, 1993).

imposed major changes to the regulatory review process of the Federal government, such as establishing a definition of “significant” rulemakings and requiring a 90-day review by the Office of Management and Budget (OMB) of those rulemakings.

Thus, FEMA proposes to state in paragraph (a) of proposed section 1.1 simply that part 1 contains FEMA’s informal rulemaking procedures that affect the public. Note that FEMA does not currently address formal rulemaking in its regulations,⁴ and does not propose to do so, as FEMA has never engaged in formal rulemaking and has no plans to do so. If the need or opportunity for a formal rulemaking should arise, FEMA will consider issuing regulations or guidance regarding formal rulemaking procedures at that time.

The Freedom of Information Act (FOIA), located in section 3(a) of the Administrative Procedure Act, requires certain agency documents to be published in the Federal Register for the guidance of the public. See 5 U.S.C. 552(a). Paragraph (b) of current section 1.1 states that FEMA’s implementation of this requirement is contained in 44 CFR part 5, subpart B, but subpart B was removed when the Department of Homeland Security (DHS) updated its FOIA regulations, which also apply to FEMA. See 81 FR 83625 (Nov. 22, 2016). FEMA finds that this cross-reference to subpart B is outdated, not necessary, and potentially confusing. Accordingly, FEMA proposes to remove it from part 1.

Paragraph (c) of current section 1.1 states that 44 CFR part 1 “contains policies and procedures for implementation of the Regulatory Flexibility Act which took effect January 1, 1981.” In this rulemaking, FEMA is proposing to remove all provisions from

⁴ Formal rulemaking is rulemaking made on the record after a formal hearing. See 5 U.S.C. 556, 557.

part 1 that address the requirements of the Regulatory Flexibility Act, as these provisions are not required to be in regulation. The requirements of the Regulatory Flexibility Act pertain to an agency's responsibilities in performing a particular kind of analysis of its rulemakings, and do not include any requirements on the public. Therefore, FEMA proposes to remove paragraph (c) from current section 1.1.

Paragraphs (d) and (e) of current section 1.1 refer to a rescinded FEMA manual that described the agency's internal rulemaking procedures.⁵ As the manual has since been rescinded, and there is no requirement to include references to such internal guidance in regulations, FEMA proposes to remove reference to such guidance in 44 CFR part 1.

Section 1.2 Definitions

Section 1.2 includes the definition of "rule or regulation," which is the same definition that appears in the Administrative Procedure Act at 5 U.S.C. 551(4). Rather than restating the definition, FEMA proposes to simply provide the reference to the APA definition, for the sake of simplicity and to avoid the possible impression that FEMA's definition differs from the Administrative Procedure Act definition.

FEMA proposes to remove the definition of "major rule." This is a term found in rescinded Executive Order 12291, and the Congressional Review of Agency Rulemaking Act (CRA), and the definition need not be parroted in regulation.⁶ FEMA is therefore proposing to remove this definition from 44 CFR part 1.

⁵ FEMA Manual 1140.1, The Formulation, Drafting, Clearance, and Publication of Federal Register Documents," was rescinded by FEMA Manual 078-1-2, "Rulemaking and Federal Register Notice Development, Drafting, and Approval Procedures," on 8/28/12.

⁶ 5 U.S.C. 801-808. See the description of the CRA in the Regulatory Analyses section of this preamble.

FEMA does not propose any changes to the definitions of “rulemaking,” “Administrator,” or “FEMA.”

Section 1.3 Scope

FEMA proposes to remove paragraph (a) of this section, because it is redundant of proposed section 1.1, addressing the scope of part 1.

FEMA proposes to remove paragraph (b) of this section, because it is not required to be in regulation. Paragraph (b) states that any delegation by the Administrator of authority to issue rules may not be further redelegated, unless expressly provided for in the delegation. Delegations are an internal agency matter, and are within the discretion of the FEMA Administrator whether to allow one of his functions to be delegable. FEMA currently has an internal delegation addressing rulemaking, FDA 0106-5 (included in the docket for this rulemaking at www.regulations.gov) which provides for FEMA rulemakings to be issued by either the Administrator or the Deputy Administrator of FEMA. It also provides for certain “routine and frequent” rulemakings regarding the National Flood Insurance Program to be issued by the Associate Administrator for Federal Insurance and Mitigation, or, if vacant, the Deputy Associate Administrator for Federal Insurance and Mitigation.

FEMA proposes to move paragraph (c) of current section 1.3 to proposed section 1.1. This paragraph explains that 44 CFR part 1 does not address formal rulemaking procedures under the Administrative Procedure Act. If the need or opportunity arises to engage in a formal rulemaking, FEMA may issue relevant regulations or guidance at that time as necessary and appropriate.

Section 1.4 Policy and procedures

FEMA proposes to remove paragraph 1.4(a), as it is based on a rescinded Executive Order, Executive Order 12291. It is not necessary to implement the provisions of such executive orders in regulation.

Current paragraph 1.4(b) states that it is FEMA's policy to provide for public participation in rulemaking regarding its programs and functions, including for matters that relate to public property, loans, grants, benefits, or contracts. FEMA declared this policy notwithstanding that the Administrative Procedure Act's notice-and-comment rulemaking requirements do not apply to such programs and functions. See 5 U.S.C. 553(a)(2). In 1971, the Administrative Conference of the United States (ACUS) issued a recommendation which recommended that all Federal agencies waive the Administrative Procedure Act exemption, finding that the public interest in participating in these matters outweighed the added process required by notice and comment rulemaking.⁷ When FEMA issued part 1 in 1981, it adopted this recommendation.

One of FEMA's main functions is to administer grant programs for emergency preparedness, response, recovery, and mitigation. The majority of these grant programs are annual grant programs, meaning Congress on an annual basis (1) appropriates a certain amount of money for the program, and (2) potentially revises requirements associated with the program. FEMA annually evaluates available resources and policy priorities, and issues notices of funding opportunity, i.e., calls for grant applications which specify the eligibility requirements and conditions for the grant. If in a given year Congress has not appropriated funds for a given annual grant program, FEMA will not issue a notice of funding opportunity or make any awards for that program.

⁷ ACUS Recommendation 69-8, adopted Oct. 21-22, 1969, available at: <https://www.acus.gov/sites/default/files/documents/69-8.pdf>.

Because of the uncertainties associated with these programs and the time and resource constraints associated with the rulemaking process, it would be extremely challenging to promulgate or revise regulations each year for these annual grant programs, and therefore FEMA's practice for years has been to post a notice of funding opportunity on its website at <https://www.fema.gov/grants> when grant funds become available. These notices provide detailed information on grant eligibility and conditions, consistent with OMB requirements.⁸ FEMA finds that regulations are not necessary for these annual grant programs, because the requirements for the grant are included in legislation and the notices of funding opportunity which are available to the public on FEMA's website and www.grants.gov.⁹

FEMA notes that in the 1971 ACUS recommendation, ACUS cited the inadequate practice of some agencies at that time of notifying applicants of available grant funds and actions taken on applications. However, it is now standard practice for Federal agencies to use the internet to disseminate information to the public. FEMA's use of its website and www.grants.gov for its annual grant programs allows any member of the public easy access to grant application information, and inadequate notice is no longer an issue.

Because it would be unduly burdensome and, in some cases, impossible to promulgate annual grant program requirements in regulation, because the APA does not require such (or any) grant program requirements to be in regulation, and because FEMA requires flexibility to adapt quickly to legal and policy mandates, FEMA considered eliminating current paragraph 1.4(b) entirely. At this time, however, FEMA prefers to

⁸ See Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, at 2 CFR 200.203.

⁹ FEMA's disaster grant programs are awarded based on event-specific Presidential declarations rather than an annual appropriation from Congress; FEMA maintains fulsome regulations for these programs.

retain a statement in support of public participation in rulemaking, because although FEMA sees little reason to retain current paragraph 1.4(b) as drafted, FEMA continues to believe that public participation is frequently beneficial to the rulemaking process, particularly for its non-annual disaster grant programs. Accordingly, FEMA proposes to modify its part 1 with respect to the grants exception. Specifically, under this proposed rule (proposed section 1.3), FEMA would retain its general policy in favor of public participation, but would retain discretion to depart from this policy in its discretion and as circumstances warrant, such as with respect to annual grant programs. FEMA also proposes to include a provision stating that its general policy of providing for public participation in rulemaking is not intended to create a right or benefit, substantive or procedural, enforceable against the United States.

FEMA proposes to remove paragraph (c) from current section 1.4, as it merely echoes the requirement of the Administrative Procedure Act at 5 U.S.C. 553 to publish notices of proposed rulemaking in the Federal Register and to give the public an opportunity to participate in the rulemaking through submission of written data, views, and arguments, with or without opportunity for oral presentation.

FEMA proposes to remove paragraph (d) from current section 1.4, which describes FEMA's policy of giving the public, including small entities and consumer groups, an early and meaningful opportunity to participate in the development of rules such as through advance notices of proposed rulemakings, holding open conferences, and convening public forums or panels. Such a policy need not be in regulation.

FEMA proposes to remove paragraph (e) from current section 1.4, which contains FEMA's policy to hold a 60-day public comment period for notices of proposed

rulemaking. This policy is consistent with the time period recommended by Executive Order 12866. Paragraph (e) also states that the comment period will include any period of review required by OMB in accordance with the Paperwork Reduction Act of 1980. Such a policy need not be in regulation.

Paragraph (f) of current section 1.4 addresses Administrative Procedure Act provisions that allow an agency to bypass notice and comment. FEMA proposes to remove paragraph (f) from current section 1.4.

Paragraph (g) of current section 1.4 addresses the delayed effective date provision of the Administrative Procedure Act. Under this provision, a substantive rule generally becomes effective no earlier than 30 calendar days after the date of publication in the Federal Register, unless the agency provides an explanation in the preamble to the rule that it has good cause to make the rule effective immediately upon the date of publication. FEMA proposes to remove this provision from current section 1.4.

Paragraph (h) of current section 1.4 addresses publication of rules in emergency situations. It states that part 1 does not apply to such situations, and any such regulation will be reported to OMB. It states that as soon as is practicable, FEMA will publish in the Federal Register a statement of the reasons why it is impracticable for the agency to follow the procedures of Executive Order 12866, and the agency shall prepare and transmit, as needed, and as soon as practicable, a regulatory impact analysis for the rule. FEMA proposes to remove this paragraph from section 1.4, because it predates the termination of FEMA's status as an independent agency, and addresses a matter of internal U.S. government coordination.

Section 1.5 Rules docket

Section 1.5 addresses the public rules docket. FEMA proposes to renumber this section as section 1.4. FEMA proposes to slightly revise this section, to clarify that the public rulemaking docket is available for public inspection after a rule document has been published in the Federal Register. This is the point when a public rulemaking docket is established. Prior to that point, any documents associated with the rulemaking are part of the internal development process, and are not included in the public docket. FEMA also proposes to clarify that the public docket is available in hard copy until the rule project is closed. Once a rule project is closed (either because the rule has been finalized or withdrawn), FEMA archives the docket at the National Archives and Records Administration, due to limited physical space at FEMA offices. An electronic copy of the docket would still be available on www.regulations.gov, however, with the exception of any copyrighted material that might be associated with the rule project.

FEMA also proposes to add a requirement that any member of the public wishing to physically inspect the public docket do so by prearrangement with FEMA. FEMA has consolidated its office space and no longer maintains a separate reading room for rule dockets. Therefore, it is necessary for FEMA to reserve a space ahead of time for a member of the public to inspect the public docket. FEMA proposes to remove the requirement that a member of the public must pay a fee to obtain a copy of the public docket.

FEMA proposes to move the provision addressing the submission of public comments to a separate section, as it is not directly related to inspection of the public docket (although public comments are included in the docket itself). The new section addressing submission of public comments would be numbered section 1.5, and

addresses submission of comments electronically to www.regulations.gov as well as submission via mail or courier to FEMA.

Finally, FEMA proposes to add a section to address the public dockets for flood hazard elevation rules. The physical repository addresses for supporting material for those rules vary depend on the locality that is the subject of the rule. FEMA includes the address in the preamble to each flood hazard elevation rule.

Section 1.6 Ex parte communications

Section 1.6 addresses ex parte communications during the rulemaking process. FEMA proposes to revise this section to cover written as well as oral communications, and to cover any such communications from outside the Federal Executive branch, rather than outside FEMA. There are various communications necessary outside FEMA but within the Federal Executive branch during the rulemaking process, such as with DHS, OMB, or other Federal agencies, as part of internal government review, to ensure consistency in Federal government policy, and to consult with other agencies with expertise in the subject of the rule or that may be affected by the rule. These communications are considered “internal” as they are contained within the Federal Executive branch. The disclosure requirements of this section are not intended to apply to such internal communications.

FEMA proposes to revise this section to cover communications from the time a notice of proposed rulemaking is published until FEMA issues a final regulatory action (such as a withdrawal of the notice of proposed rulemaking or a final rule). Under the current regulation, communication is only restricted during the open public comment period, which tends to defeat the purpose of transparency in development of the

regulatory action, since once the comment period closes, ex parte communications can occur while the next regulatory action is being developed. To ensure transparency for the entire development of the rule from publication of the notice of proposed rulemaking until issuance of a final action, FEMA proposes to revise the applicability of its ex parte regulation to also cover the time between the close of a proposed rule comment period and the issuance of a final action.

FEMA proposes to remove the introductory language of this section, which states that the section applies to rulemaking proceedings governed by the procedural requirements of 5 U.S.C. 553 (i.e., informal rulemaking). The purpose section of part 1 already limits the scope of part 1 to informal rulemaking so this introductory language to section 1.6 is unnecessary.

FEMA proposes to add a provision noting that the ex parte restrictions do not apply to Tribal consultations. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments,¹⁰ and Presidential Memorandum of November 9, 2009, Tribal Consultation,¹¹ require Federal agencies to consult with Tribes on actions that have Tribal implications. In order to facilitate and support these communications, FEMA encourages Tribal consultation early in the rule development process and does not impose ex parte restrictions on such consultations.

Section 1.7 Regulations agenda

¹⁰ 65 FR 67249 (Nov. 9, 2000).

¹¹<https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president>; see also FEMA's Tribal Consultation Policy, FP101-002.01, included in the docket for this rulemaking on www.regulations.gov and on FEMA's website at <https://www.fema.gov/media-library/assets/documents/98120>.

Section 1.7 contains outdated requirements that were part of the now-rescinded Executive Order 12291 regarding the government-wide regulations agenda. Current Executive Order 12866 also contains requirements that agencies must follow for the regulations agenda, as does the Regulatory Flexibility Act. FEMA proposes to remove these requirements, as OMB publishes the agenda on its website, which any member of the public may view at www.reginfo.gov, and because of Executive Order 12291's rescission.

Section 1.8 Regulations review

Section 1.8 describes FEMA's intent to publish in the Federal Register, and keep updated, a plan for periodic review of existing rules at least within 10 years from the date of publication of a final rule. FEMA proposes to remove this section from part 1, as the process for review of existing rules has changed. President Trump recently issued Executive Order 13777, "Enforcing the Regulatory Reform Agenda," which outlines specific requirements related to retrospective review.¹² And past executive orders, such as Executive Order 13563, "Improving Regulation and Regulatory Review," include certain retrospective review requirements as well.¹³ FEMA has actively participated in such reviews, and will continue to do so.

Section 1.9 Regulatory impact analysis

Section 1.9 lists the regulatory impact analysis requirements that were part of the now-rescinded Executive Order 12291. These requirements have been replaced by a series of executive orders and OMB Circular A-4, "Regulatory Analysis." A copy of the circular is included in the docket for this rulemaking. FEMA must follow these

¹² 82 FR 12285 (Mar. 1, 2017).

¹³ 76 FR 3821 (Jan. 21, 2011).

guidelines when preparing a regulatory impact analysis for its rules. As these guidelines apply to the agency rather than the public, it is not necessary to include them in the CFR. Therefore, FEMA proposes to remove section 1.9 from its regulations rather than updating it with the new guidelines.

Section 1.10 Initiation of rulemaking

This section addresses the process for initiating a rulemaking at FEMA, both internally by the Administrator of FEMA and externally via a petition for rulemaking. FEMA's process for initiating a rule is an internal agency matter, and the ultimate authority for initiating a rule resides with the Administrator. Thus, FEMA proposes to remove reference to the internal process for initiating a rule from its regulations. Initiation of a rule via a petition for rulemaking is addressed in a separate section (current section 1.18, which is renumbered as section 1.8 in this proposed rule). Therefore, as petitions for rulemaking are fully addressed in a separate section, FEMA proposes to remove section 1.10 in its entirety from the regulations.

Section 1.11 Advance notice of proposed rulemaking

Section 1.11 lists the requirements for the contents of an advance notice of proposed rulemaking (ANPRM), a regulatory action that typically takes place to gather information for a possible future notice of proposed rulemaking. These ANPRM requirements are part of FEMA's internal procedures and controls for its regulatory actions; FEMA proposes to remove them from the CFR.

Section 1.12 Notice of proposed rulemaking

Section 1.12 lists the requirements for the contents of a notice of proposed rulemaking, a regulatory action that notifies the public of various information, including

but not limited to, the substance or terms of the proposed rule or a description of the subject matter and issues involved and a reference to the legal authority under which the proposed rule is issued. These elements are already required by statute; FEMA, therefore, proposes to remove them from the CFR.

Section 1.12 also states that it is desirable that the proposed rule contain a target deadline for issuance of the regulation, and that to the extent feasible, this deadline be met. FEMA proposes to remove this provision because such a target, announced in a proposed rule, would too frequently be unduly speculative. For instance, FEMA does not presume that each proposed rule will result in a final rule.

The final provision of section 1.12 states that if the proposed rule is one which contains a requirement for a collection of information, a copy of the rule will be furnished to OMB in accordance with the Paperwork Reduction Act. Under internal Federal government procedure, FEMA is required to submit all information collections, whether included with a rule or not, to OMB, via DHS. A regulation is not necessary for this function, and therefore FEMA proposes to remove it from the CFR.

Section 1.13 Participation by interested persons

Section 1.13 states that any interested person may participate in rulemaking proceedings by submitting written data, views, or arguments within the comment time stated in the notice. This is a requirement of the Administrative Procedure Act and FEMA includes it in all of its rulemaking notices for proposed rules and advance notices of proposed rulemakings. As it is not necessary to include in regulation, FEMA proposes to remove it from the CFR.

Section 1.13 includes a provision stating that the Administrator may permit the filing of comments in response to original comments. FEMA proposes to remove this provision because it is unnecessary to include in the CFR.

Section 1.13 also states that the Administrator may provide for oral presentation of views in additional proceedings; this is also addressed in section 1.14. FEMA proposes to remove these provisions from the CFR. FEMA's policy for providing for public hearings is addressed in FEMA's notices of proposed rulemaking.

The last provision of section 1.13 states that FEMA will send copies of regulatory flexibility analyses to the Chief Counsel for Advocacy of the Small Business Administration. As this provision is regarding internal agency procedure and does not affect the public, FEMA proposes to remove it from the regulation.

Section 1.14 Additional rulemaking proceedings

Section 1.14 states that the Administrator may invite interested persons to present oral arguments, appear at informal hearings, or participate in any other procedure affording opportunity for oral presentation of views. FEMA's current policy is to include in each notice of proposed rulemaking, as appropriate, a statement noting that any member of the public may submit a request for a public meeting. If a hearing is held, FEMA will publish notice of such in the Federal Register. This provision is not necessary to include in the CFR. Therefore, FEMA proposes to remove it.

FEMA proposes to retain the provision indicating that FEMA will keep a transcript or minutes of any hearing, but proposes to move it to the section on hearings (currently section 1.15; renumbered as section 1.7 in the proposed rule). Note that

FEMA considers any oral presentation a hearing; any oral presentation would fall under the provision addressing hearings (discussed below).

Section 1.15 Hearings

Section 1.15 addresses the nature of public hearings should FEMA hold one for a particular rulemaking. Any such public hearing is nonadversarial and for fact-finding only. FEMA proposes to remove the provision stating that formal rulemaking hearing procedures do not apply, since section 1.1 already limits the scope of part 1 to informal rulemaking.

Section 1.16 Adoption of a final rule

Section 1.16 addresses FEMA's procedure for issuing a final rule. Paragraph (a) states that FEMA must address any relevant significant issues set forth in comments received on the proposed rule. Paragraph (a) also requires the final rule to include a clear concise statement of the basis and purpose of the rule. These are Administrative Procedure Act requirements placed on agencies rather than the public and therefore FEMA proposes to remove these from the regulation.

Paragraph (b) lists other information that FEMA may include in a final rule preamble. The information is similar to information covered by Administrative Committee of the Federal Register regulations at 1 CFR 18.12. There is no need to reiterate this list in FEMA's regulations. Therefore FEMA proposes to remove paragraph (b) from part 1.

Paragraph (c) states that a statement shall be published at the time of publication of a final rule describing how the public may obtain copies of the final regulatory

flexibility analysis. FEMA proposes to remove this provision because it is not necessary; FEMA automatically posts such analyses on www.regulations.gov for public viewing.

Paragraph (d)(1) states that before approving any final major rule, FEMA will make a determination that the regulation is clearly within the authority delegated by law and consistent with congressional intent and include in the Federal Register at the time of promulgation a memorandum of law supporting that determination. FEMA proposes to remove this provision because it no longer reflects FEMA practice. FEMA includes the legal authority for the rule in the rulemaking document, and this is also a requirement of the Federal Register (each rulemaking must include an “authority citation”). Although FEMA internally makes a legal determination that the regulation is within FEMA’s legal authorities, FEMA does not include in the Federal Register a memorandum of law supporting that determination.

Paragraph (d)(2) states that FEMA must make a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular. FEMA proposes to remove this provision.

Section 1.17 Petitions for reconsideration

Section 1.17 states that FEMA will not consider petitions for reconsideration of a final rule, and that such petitions will be treated as petitions for rulemaking. This remains FEMA’s policy, and FEMA proposes no revisions to this section, other than to revise the reference to section 1.18, which would become section 1.9 if this proposed rule is finalized.

Section 1.18 Petitions for rulemaking

Section 1.18 addresses petitions for rulemaking. It states that any interested person may petition the Administrator for the issuance, amendment, or repeal of a rule, and for purposes of this section, the term “person” includes a “Federal, State, or local government or government agency.” FEMA proposes to revise the definition of “person” to include “any member of the public and any entity outside the Federal Executive branch.” FEMA considers any “petitions” from entities of the Federal Executive branch as internal to the government and not subject to the same requirements as petitions from the public. There is communication amongst Federal Executive branch agencies on a regular basis and any need for a rule would be raised through those channels. This is not a change from the current intent of this section, but FEMA is proposing this new language for the sake of clarity.

This section states that petitions should be submitted to the “Rules Docket Clerk.” As FEMA no longer has a “Rules Docket Clerk,” FEMA proposes to change this to the “Regulatory Affairs Division,” which is the division responsible for processing any petitions to FEMA for rulemaking. FEMA also proposes to require that petitions for rulemaking be labeled as such, to avoid situations where simple correspondence is confused with a petition.

Authority Citation

FEMA proposes to revise the authority citation for part 1 by removing the reference to rescinded Executive Order 12291, as well as the references to the Reorganization Plan No. 3 of 1978, Executive Order 12127, and Executive Order 12148. The Reorganization Plan and Executive Orders 12127 and 12148 established FEMA as

an agency in 1979 and established its functions. FEMA proposes to replace these cites with a citation to the Homeland Security Act of 2002, 6 U.S.C. 101 et seq., which provided organic authority for FEMA and made it a component of the Department of Homeland Security, and Department of Homeland Security Delegation 9001.1, which delegated specific functions back to FEMA.

FEMA also proposes to remove the citation to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) because references to that Act would no longer be included in part 1 if the proposed rule is finalized.

FEMA proposes to retain the citations to the informal rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 551 and 553) as these are the main authorities for this part.

Change chart

The following chart lists the current section and how it is affected by the proposed rule:

<u>Current section</u>	<u>Proposed rule</u>
<u>1.1 Purpose</u>	
1.1(a)	1.1(a)
1.1(b)	Removed
1.1(c)	Removed
1.1(d)	Removed
1.1(e)	Removed
<u>1.2 Definitions</u>	
1.2(a)	1.2(a)
1.2(b)	1.2(b)
1.2(c)	1.2(c)
1.2(d)	1.2(d)
1.2(e)	Removed
<u>1.3 Scope</u>	
1.3(a)	1.1(a)
1.3(b)	Removed

1.3(c)	1.1(b)
<u>1.4 Policy and Procedures</u>	Removed, except 1.4(b) moved to 1.3
<u>1.5 Rules docket</u>	
1.5(a)	1.4(a) & 1.5
1.5(b)	1.4(b)
<u>1.6 Ex parte communications</u>	
1.6 Introductory language	Removed
1.6(a)	1.6(a)
1.5(b)	1.6(b)
<u>1.7 Regulations agendas</u>	Removed
<u>1.8 Regulations review</u>	Removed
<u>1.9 Regulatory impact analyses</u>	Removed
<u>1.10 Initiation of rulemaking</u>	
1.10	1.8 / partially removed
<u>1.11 Advance notice of proposed rulemaking</u>	Removed
<u>1.12 Notice of proposed rulemaking</u>	Removed
<u>1.13 Participation by interested persons</u>	Removed
<u>1.14 Additional rulemaking proceedings</u>	1.7(c) / partially removed
<u>1.15 Hearings</u>	
1.15 (a)	1.7(a) / partially removed
1.15(b)	1.7(b)
<u>1.16 Adoption of a final rule</u>	Removed
<u>1.17 Petitions for reconsideration</u>	1.9
<u>1.18 Petitions for rulemaking</u>	1.8

IV. Regulatory Analyses

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. As this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. See OMB’s Memorandum “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

This proposed rule would revise FEMA regulations pertaining to rulemaking by removing sections that are outdated or do not affect the public and update provisions that affect the public’s participation in the rulemaking process. FEMA does not believe this rule imposes additional direct costs on the public or government.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), as amended, 5 U.S.C. 601-612, agencies must consider the impact of their rulemakings on “small entities” (small businesses, small organizations and local governments). When the Administrative Procedure Act requires an agency to publish a notice of proposed rulemaking under 5 U.S.C. 553, the RFA requires a regulatory flexibility analysis for both the proposed rule and the final rule if the rulemaking could “have a significant economic impact on a substantial number of small entities.” The RFA also provides that in lieu of a regulatory flexibility analysis, the agency may certify in the rulemaking document that the rulemaking will not “have a significant economic impact on a substantial number of small entities” along with a statement providing the factual basis for such certification. FEMA has voluntarily published a notice of proposed rulemaking in this case, notwithstanding that this rule is a rule of agency organization, procedure, or practice exempt from notice-and-comment rulemaking requirements. See 5 U.S.C. 553(b)(A).

This proposed rule would revise FEMA regulations pertaining to rulemaking by removing sections that are outdated or do not affect the public and update provisions that affect the public’s participation in the rulemaking process. This rule does not impose direct costs on small entities. Accordingly, and although FEMA is not required to make such certification, pursuant to section 605(b) of the RFA, 5 U.S.C. 605(b), the Administrator of FEMA certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 658, 1501-1504, 1531-1536, 1571, pertains to any notice of proposed rulemaking which implements any rule

that includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If the rulemaking includes a Federal mandate, the Act requires an agency to prepare an assessment of the anticipated costs and benefits of the Federal mandate. The Act also pertains to any regulatory requirements that might significantly or uniquely affect small governments. Before establishing any such requirements, an agency must develop a plan allowing for input from the affected governments regarding the requirements.

FEMA has determined that this rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, nor by the private sector, of \$100,000,000 or more in any one year as a result of a Federal mandate, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA), as amended, 44 U.S.C. 3501-3520, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency obtains approval from OMB for the collection and the collection displays a valid OMB control number. See 44 U.S.C. 3506, 3507. FEMA has determined that this rulemaking does not contain any collections of information as defined by that Act. PRA regulations exempt general solicitations of comments from the public such as rulemakings. See 5 CFR 1320.3(h)(4).

Privacy Act/E-Government Act

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a proposed regulation will result in a system of records. A “record” is any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his/her education, financial transactions, medical history, and criminal or employment history and that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. See 5 U.S.C. 552a(a)(4). A “system of records” is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

The E-Government Act of 2002, 44 U.S.C. 3501 note, also requires specific procedures when an agency takes action to develop or procure information technology that collects, maintains, or disseminates information that is in an identifiable form. This Act also applies when an agency initiates a new collection of information that will be collected, maintained, or disseminated using information technology if it includes any information in an identifiable form permitting the physical or online contacting of a specific individual.

This proposed rule does not create a new, nor impact a current, system of record. Therefore, this proposed rule does not require coverage under an existing or new Privacy Impact Assessment or System of Records Notice. Any member of the public or any non-Federal entity may submit comments on a rulemaking; all comments are posted on www.regulations.gov, and that website, as well as each FEMA rulemaking document

requesting comments, includes a Privacy Notice informing the commenter that any comments will be posted for public viewing.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 FR 67249, November 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Under this Executive Order, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless funds necessary to pay the direct costs incurred by the Indian Tribal government or the Tribe in complying with the regulation are provided by the Federal Government, or the agency consults with Tribal officials.

This rule does not have Tribal implications. Any member of the public and any non-Federal entity, including Tribes and Tribal members, may participate in Federal rulemaking as outlined in this proposed rule, and it is FEMA’s policy that ex parte restrictions in rulemaking do not apply to Tribal consultations.

Executive Order 13132, Federalism

Executive Order 13132, “Federalism,” 64 FR 43255, August 10, 1999, sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have “substantial direct effects on the States, on the relationship between the national government and the States,

or on the distribution of power and responsibilities among the various levels of government.” Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with State and local officials before implementing any such action.

FEMA has reviewed this proposed rule under Executive Order 13132 and has determined that this rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications as defined by the Executive Order. It addresses agency procedures for rulemaking that affect the public; such rulemaking is a Federal process and does not affect State rulemaking processes.

Congressional Review of Agency Rulemaking

Under the Congressional Review of Agency Rulemaking Act (CRA), 5 U.S.C. 801-808, before a rule can take effect, the Federal agency promulgating the rule must submit to Congress and to the Government Accountability Office (GAO) a copy of the rule; a concise general statement relating to the rule, including whether it is a major rule; the proposed effective date of the rule; a copy of any cost-benefit analysis; descriptions of the agency’s actions under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act; and any other information or statements required by relevant executive orders.

FEMA will send this rule to the Congress and to GAO pursuant to the CRA if the rule is finalized. The rule is not a “major rule” within the meaning of the CRA. It will

not have an annual effect on the economy of \$100,000,000 or more; it will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects in 44 CFR Part 1

Administrative practice and procedure.

For the reasons discussed in the preamble, the Federal Emergency Management Agency proposes to revise 44 CFR part 1 as follows:

PART 1 – Rulemaking, Policy and Procedures

Sec.

- 1.1 Purpose and scope.
- 1.2 Definitions.
- 1.3 Regulatory policy.
- 1.4 Public rulemaking docket.
- 1.5 Public comments.
- 1.6 Ex parte communications.
- 1.7 Hearings.
- 1.8 Petitions for rulemaking.
- 1.9 Petitions for reconsideration.

Authority: 5 U.S.C. 551, 553; 6 U.S.C. 101 et seq.; Department of Homeland Security Delegation 9001.1.

§1.1 Purpose and scope.

(a) This part contains FEMA’s procedures for informal rulemaking under the Administrative Procedure Act (5 U.S.C. 553) that affect the public.

(b) This part does not apply to rules issued in accordance with the formal rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 556, 557).

§1.2 Definitions.

(a) Rule or regulation have the same meaning as those terms are defined in the Administrative Procedure Act (5 U.S.C. 551(4)).

(b) Rulemaking means the FEMA process for considering and formulating the issuance, amendment, or repeal of a rule.

(c) Administrator means the Administrator, FEMA, or an official to whom the Administrator has expressly delegated authority to issue rules.

(d) FEMA means Federal Emergency Management Agency.

§1.3 Regulatory policy.

(a) It is the general policy of FEMA to provide for public participation in rulemaking regarding its programs and functions, including matters that relate to public property, loans, grants, or benefits, or contracts, even though these matters are not subject to a requirement for notice and public comment rulemaking by law. This general policy is not intended to and does not create a right or benefit, substantive or procedural, enforceable against the United States or its agencies or officers.

(b) FEMA may depart from this general policy in its absolute discretion, including for its annual grant programs and in other cases as circumstances warrant.

§1.4 Public rulemaking docket.

(a) FEMA maintains a public docket for each rulemaking after it is published in the Federal Register and until the rulemaking is closed and archived at the National Archives and Records Administration. The public docket includes every document published in the Federal Register in conjunction with a rulemaking. It also includes regulatory assessments and analyses, written comments from the public addressed to the merits of a

proposed rule, comments from the public received in response to notices, or to withdrawals or terminations of a proposed rulemaking, requests for a public meeting, requests for extension of time, petitions for rulemaking, grants or denials of petitions or requests, and transcripts or minutes of informal hearings. The public rulemaking docket is maintained by the Regulatory Affairs Division, Office of Chief Counsel.

(b) After FEMA establishes a public rulemaking docket, any person may examine docketed material during established business hours by prearrangement with the Regulatory Affairs Division, Office of Chief Counsel, FEMA, 500 C St. SW., Washington, DC, 20472, and may obtain a copy of any docketed material (except for copyrighted material). FEMA also maintains a copy of each public docket electronically, with the exception of copyrighted material, on www.regulations.gov. To access the docket on www.regulations.gov, search for the docket ID associated with the rulemaking.

(c) The docket for flood hazard elevation rules issued by the National Flood Insurance Program are partially maintained at the locality that is the subject of the rule. FEMA includes in the preamble of each flood hazard elevation rule the repository address for supporting material.

§1.5 Public comments.

A member of the public may submit comments via mail or courier to the Regulatory Affairs Division, Office of Chief Counsel, Federal Emergency Management Agency, 500 C St. SW., Washington, DC 20472, or may submit comments electronically to the rulemaking docket at www.regulations.gov under the applicable docket ID.

§1.6 Ex parte communications.

(a) All oral or written communications from outside the Federal Executive branch of significant information and argument respecting the merits of a rulemaking document, received after publication of a notice of proposed rulemaking, by FEMA or its offices and divisions or their personnel participating in the decision, must be summarized in writing and placed promptly in the public docket. This applies until the agency publishes a final regulatory action such as a withdrawal of the notice of proposed rulemaking or a final rule.

(b) FEMA may conclude that restrictions on ex parte communications are necessitated at other times by considerations of fairness or for other reasons.

(c) This section does not apply to Tribal consultations.

§1.7 Hearings.

(a) When FEMA affords an opportunity for oral presentation, the hearing is an informal, nonadversarial, fact-finding proceeding. Any rulemaking issued in a proceeding under this part in which a hearing is held need not be based exclusively on the record of such hearing.

(b) When such a hearing is provided, the Administrator will designate a representative to conduct the hearing.

(c) The transcript or minutes of the hearing will be kept and filed in the public rulemaking docket.

§1.8 Petitions for rulemaking.

(a) Any interested person may petition the Administrator for the issuance, amendment, or repeal of a rule. For purposes of this section, the term person includes

any member of the public and any entity outside the Federal Executive branch of government. Each petitioner must:

(1) Submit the petition to the Regulatory Affairs Division, Office of Chief Counsel, FEMA, 8NE, 500 C Street, SW., Washington, DC, 20472;

(2) Label the petition with the following: “Petition for Rulemaking” or “Rulemaking Petition”;

(3) Set forth the substance of the rule or amendment proposed or specify the rule sought to be repealed or amended;

(4) Explain the interest of the petitioner in support of the action sought; and

(5) Set forth all data and arguments available to the petitioner in support of the action sought.

(b) No public procedures will be held directly on the petition before its disposition. If the Administrator finds that the petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued as appropriate. If the Administrator finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief statement of the ground for denial.

The Administrator may consider new evidence at any time; however, FEMA will not consider repetitious petitions for rulemaking.

§1.9 Petitions for reconsideration.

Petitions for reconsideration of a final rule will not be considered. Such petitions, if filed, will be treated as petitions for rulemaking in accordance with §1.8 of this part.

Dated: May 30, 2017.

Robert Fenton,
Senior Official Performing the Duties of the Administrator,
Federal Emergency Management Agency.
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